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RECORD, CASE No. 15,041.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~1071~~. 747 404 20 17

WILLIAM HENRY, APPELLANT,

vs.

THE ALABAMA AND VICKSBURG RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED MAY 16, 1892.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 27, 1892.

1 *Bill of Review.*

To the honorable the judges of the circuit court of the United States for the southern district of Mississippi:

Humbly complaining, showeth unto your honors the plaintiff, William Henry, a resident and citizen of Warren county, Mississippi, that on the — day of February, A. D. 1888, he exhibited his petition in this honorable court against the Vicksburg & Meridian railroad and Frank S. Bond, receiver of said railroad under the appointment of this court, in which he humbly complained of injuries inflicted upon him by the gross negligence of said railroad and of said receiver in using and permitting to be used on said railroad cars of a peculiar and dangerous construction, not ade-
2 quately and reasonably safe to be handled, in consequence of which the petitioner, while in the employ of said road and while engaged in his ordinary duties, in the usual and ordinary way, suffered the injuries complained of, and prayed for a trial at law, as will more fully appear from his said petition, on file in the records of your honorable court; that said Frank S. Bond, receiver aforesaid, being ordered by this honorable court to answer, appeared and put in his answer to said petition, as will more fully appear from his said answer, on file in the records of your honorable court; that said cause was set down for hearing on the 14th day of February, 1888, and a jury called and empanneled to try the issues at law, when your honors, in the exercise of the discretion vested in you by the practice of the court, denied to the petitioner the privilege of a trial by jury and proceeded to examine the witnesses orally and to take testimony *viva voce* in open court, and after the proofs were closed and the cause heard the court pronounced a decree, which was afterwards passed and enrolled, and delivered a written opinion, finding the law and the facts against the petitioner, as will more fully appear from said opinion and decree on file in the records of your honorable court; that the petitioner thereupon, and at the same term of your honorable court, filed his petition for rehearing, in which he humbly submitted to your honors that in consequence of his physical disability, resulting from the injuries so inflicted, and in consequence of his poverty, resulting from such disability, he had been unable to give proper and necessary attention to the preparation of his case and to procure the attendance of his witnesses; that one of his witnesses, upon whom he relied for necessary and material testimony, had gone away out of the jurisdiction of the court without the knowledge of petitioner and could not be found by the marshal nor served with the summons issued for him; that such abscence was not discovered by petitioner until the trial had begun, and that he could prove by the testimony of such witness and of others, whose names were
3 then unknown to him, that cars of the peculiar construction complained of were recognized by all railroad men to be so absolutely unsafe and dangerous that they were not used and not permitted to be used on other railroads, as will more fully appear

from said petition on file in the records of your honorable court; that your honors denied the petition for rehearing for the reason assigned, not because the petitioner had been guilty of laches in failing to procure the attendance of his witnesses, but because such testimony, if adduced, would not have affected the judgment of the court, the court being of the opinion, as matter of law, that it was contributory negligence on the part of petitioner to remain in the service of the road with the knowledge that such cars were passing over and being used on the road, even if said cars were absolutely unsafe and dangerous, as will more fully appear from the opinion refusing the rehearing, on file in the records of your honorable court; and the said decree has since, and on or about the — day of February, A. D. 1888, been duly signed and enrolled.

Which said decree the plaintiff insists is erroneous and ought to be reviewed and reversed and set aside for the many apparent errors and imperfections, as it appears by the record.

First. That your honors have decided as matter of law that if the petitioner supposed that the cars complained of were too dangerous to be used on these trains he should have notified the receiver or other proper officer of the road, and if they were continued should have left the employment; that the said decision was rendered upon the authority of the decision of Judge Cooley in Michigan Central Railroad *vs.* Smithson, 45 Mich., 212, "as since considered the settled law on this question:" that your honors were asked to decide upon the authority of the doctrine laid down by the Supreme Court in Chicago, M. & St. P. R'y Co. *vs.* Ross, 112 U. S., 377, and by Judge Treat in O'Neil *vs.* St. Louis, Iron Mountain & Southern R'y
4 Co., that "the servant having been engaged for the performance of specified services, takes upon himself the ordinary risks incident thereto, and as a consequence, if he suffers by exposure to them, he cannot recover compensation from his employer, the reason for this exemption being that he has, or in law is supposed to have, them in contemplation when he engaged in the service, and that his compensation is arranged accordingly. He cannot in reason complain if he suffers from a risk which he has voluntarily assumed; but, however this may be, it is indispensable to the employer's exemption from liability to his servant for the consequence of risks thus incurred that he should be himself free from negligence. He must furnish to the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated, and if he fail in that respect and an injury results, he is as liable to the servant as he would be to a stranger;" that this doctrine is in conflict with and distinctly overrules the doctrine of Judge Cooley, more concisely stated in Perigo *vs.* G. P. & P. R. Co., 3 Northwestern Reporter, 43, "that the negligence of the defendant in furnishing defective and improperly constructed machinery and implements is waived by remaining in the employment without protest or promise of amendment, and should prove it;" that in conformity to the later doctrine it has been very recently decided, in Richmond & Danville R'y Co. *vs.* Normand, 4 Southeastern Reporter, 211, that if, owing to the negli-

gent and dangerous manner in which a railroad company carries on its operations, an employee receives injuries while performing his duties, he is not prevented from recovering damages from the company by reason of his having continued in its service with full knowledge of the manner in which its operations were conducted and without complaint; that it was proved at the hearing that the petitioner was and had been for five years the foreman in charge of the switch engine in the yard of said railroad, in receiving cars, making up trains, etc.

5 That for two years previous to May 13, 1887, the receiver, by his employees, had used on said railroad and the railroads connected with it cars with what are called aprons on the sides and ends of flat or platform cars, used mostly in construction trains for moving earth and other materials; but when not so used were used for the transportation of lumber, cotton, and other freight transported on the ordinary flat cars and as the other cars are used; that these apron cars, as they are called, have a plank of seven inches wide over the ends and sides of the car, so that when the cars come together the floors meet, or nearly so; that cars of this peculiar construction were specially intended for the transportation of earth, sand, and gravel in construction trains, and were not used on other roads, even for such transportation, except as stated by one of defendants' witnesses, on one or two railroads in Texas; that they had been used on the Vicksburg & Shreveport road, a branch of the same system, for purposes of construction, and when no longer needed there were introduced by the receiver on the Vicksburg & Meridian road and used in the freight trains on that road because of a scarcity of rolling stock; that it was charged by the petitioner that the said cars were not the means which the said service required for its efficient and safe performance and were not reasonably and adequately safe for the purposes for which they were used, because there were no bumpers to keep the cars apart, and when the cars came together the floors met, or nearly so, so as to make it impossible to couple them in the usual and ordinary way and difficult and dangerous to couple them at all, and that such cars were all the more unsafe and dangerous to be handled at night, because the petitioner, when employed in his usual and ordinary duties, in the usual and ordinary way, was unable to distinguish such cars from the ordinary platform cars, and could not know, except by quitting his usual post and making a close inspection, that he was required to perform an extr-hazardous service, and for this reason

6 he had never before been called on to handle them or attempted to handle them at night; that such cars were not reasonably and adequately safe for the purposes for which they were used, and it was negligence on the part of the receiver to use or permit them to be used in freight trains because of a scarcity of cars of a proper construction for such use, and for purposes of economy only to subject the employees of the road to risks which were not ordinarily incident to the employment, and that he was not exempt from this liability because the petitioner waived the negligence by remaining in the employment without protest or promise of amend-

ment; that the petitioner had been in the employment of the railroad as brakeman for seven years previous to the injury and for five years as foreman of the switch gang, and took upon himself the ordinary risks incident to such employment, but did not take upon himself such extraordinary risks as he was subjected to by the introduction into the freight trains of cars not reasonably and adequately safe for the purposes of transportation, and it was not negligence on his part to remain in the employment upon which he depended for his daily bread, and he was not required to expose himself and his family to want and privation and, perhaps, starvation by quitting his employment because said receiver used or permitted to be used such cars on the road.

That it was the duty of said receiver to provide cars reasonably and adequately safe for the use intended, and his neglect to comply with such duty exposed the petitioner to the extraordinary risk from which the injury resulted; that the petitioner in his application for rehearing offered to prove that such cars were not used nor allowed to be used on other roads because they were regarded by railroad men as absolutely unsafe and dangerous, and your honors denied the rehearing because, in your opinion, as matter of law, if such cars were shown to be absolutely unsafe and dangerous, the negligence of the defendant was waived by the plaintiff remaining in the employment.

7 The plaintiff most respectfully insists that this opinion is error, and that for such error the decree should be reviewed and reversed and the plaintiff afforded an opportunity to prove that such cars are not only not reasonably and adequately safe, but are absolutely dangerous and unsafe. Your petitioner shows that he desires to prosecute an appeal from the said judgment and decree of your honorable court to the Supreme Court of the United States, in order to obtain the judgment of said honorable court on the question of law so decided, but that he cannot do so because the trial at law was refused and no bill of exceptions could be reserved, and because the testimony at the hearing was taken *viva voce* and not reduced to writing, because your honors found the facts against him and because you denied the rehearing for the reason assigned, and no appeal lies from your decree refusing the rehearing.

That the defendant, Vicksburg & Meridian Railroad, is about to be sold under a decree of your honorable court, and it is necessary to have the receiver, Frank S. Bond, retain enough of the proceeds of the sale or of the income and profits of the road to respond to the demand of your petitioner if he should ultimately obtain judgment.

Wherefore, the premises considered, your petitioner prays to be allowed to file this his bill of review, and that the same be filed and served, and that Frank S Bond, receiver of said Vicksburg & Meridian railroad, be ordered to retain in his hands enough of the proceeds of the sale of the road or of the income and profits to respond to the demand of petitioner, and to answer, plead, or demur to the bill, and that the judgment of this honorable court may be reviewed and reversed for the errors of law assigned and petitioner

thus enabled to adduce his proof of the facts, and for such other relief as equity and the circumstances of the case may require.

WADE R. YOUNG,
Solicitor for Petitioner.

Endorsed: "Filed Jan. 22, 1889. J. M. McKee, clerk, by W. B. Banks, D. C."

Demurrer.

8 WILLIAM HENRY vs. F. S. BOND, Receiver. } Demurrer to Petition for Review.

And now comes the said defendant, by his attorneys, and demurs to the petition of review filed herein, as follows:

1. There is no equity on the face of the petition.
2. A petition or bill of review is unknown in an action of damages for negligence.
3. The plaintiff made his motion for a new trial, which was overruled.
4. A petition or bill of review for error of law is only allowable where the error of law appears on the face of the original bill or petition and answer.
5. A petition or bill of review for error of fact is only allowable when the facts were newly discovered after the final decree.
6. And numerous other reasons.

Whence defendant prays judgment, &c.

BIRCHETT & GILLAND,
For Defendant.

Endorsed: "Filed Jan. 24, 1889. J. M. McKee, clerk, by W. B. Banks, D. C."

Decree.

WILLIAM HENRY vs. FRANK S. BOND, Receiver. }

This matter coming on for hearing on the demurrer of defendant to the petition of review filed herein by said plaintiff, and the court having duly considered the same, it is ordered, adjudged, and decreed that the said demurrer be, and is hereby, sustained and the said petition or bill dismissed.

R. A. HILL, *Judge.*

Endorsed: "Filed Jan. 24, 1889. J. M. McKee, clerk, by W. B. Banks, D. C."

Petition and Order of Appeal.

9 To the honorable the judges of the circuit court of the United States for the western division of the southern district of Mississippi:

The petition of William Henry respectfully shows that at the January term of this honorable court for the year 1888 he filed his

resides at St. Joseph, La., and that he is worth the full sum
12 of five hundred dollars over and above all his debts and liabilities and exemptions.

WILLIAM C. YOUNG.

Subscribed and sworn to March 12, 1892.

[SEAL.] JOS. CURRY,
Clerk 9th Dist. Court, Tensas Parish, La.

I approve the within and foregoing bond and surety this the 16th day of March, 1892.

HENRY C. NILES,
U. S. Dist. Judge.

Endorsed: "Filed March 21, 1892. R. H. Winter, clerk; W. B. Banks, D. C."

Certificate.

I, R. H. Winter, clerk of the circuit court of the United States for the western division of the southern district of Mississippi, do hereby certify that the foregoing 12 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the bill of review in the case of William Henry *vs.* F. S. Bond, receiver of the Vicksburg & Meridian Railroad Company, No. — of the docket of said court.

Witness my hand and the seal of said court, at the city of Vicksburg, Mississippi, this 12 day of May, 1892.

[Seal U. S. Circuit Court, 5th Circuit, Southern District of Mississippi.]

R. H. WINTER, *Clerk.*
W. B. BANKS, *D. C.*

Endorsed on cover: Case No. 15,041. S. Mississippi C. C. U. S. Term No., 1071. William Henry, appellant, *vs.* The Alabama & Vicksburg Railroad Company. Filed May 16th, 1892.

164-701

Office Supreme Court, U. S.
FILED
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JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 17.

WILLIAM HENRY, APPELLANT,

vs.

THE ALABAMA AND VICKSBURG RAILROAD COMPANY.

BRIEF FOR APPELLANT.

WADE R. YOUNG,
Counsel for Appellant.

(15,041.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 17.

WILLIAM HENRY, APPELLANT,

vs.

THE ALABAMA AND VICKSBURG RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF OF APPELLANT.

This is an appeal from a decree of the court sustaining a demurrer to a bill of review, filed to have the Court review its decree rendered on the petition of the appellant against the receiver of the court for damages resulting from personal injuries, for the error of law assigned.

STATEMENT OF FACTS.

The facts admitted by the demurrer to the bill are:

That the appellant had been for a number of years prior to May 13, 1887, the date of the injury, in the employ of the railroad, as foreman of the switch gang.

That for two years prior to said date the receiver had used on said railroad and the railroads connected with it cars with what are called aprons on the sides and ends of flat or platform cars, used mostly in construction trains for moving earth and other materials; but when not so used were used for the transportation of lumber, cotton, and other freight transported on the ordinary flat cars, and as the other cars are used.

That these apron cars, as they are called, have a plank of seven inches wide over the ends and sides of the car, so that when the cars come together the floors meet, or nearly so.

That cars of this peculiar construction were specially intended for the transportation of earth, sand, and gravel in construction trains, and were not used on other roads, even for such transportation, except, as stated by one of defendant's witnesses, on one or two railroads in Texas.

That they had been used on the Vicksburg and Shreveport road, a branch of the same system, for purposes of construction, and when no longer needed there were introduced by the receiver on the Vicksburg and Meridian road and used in the freight trains on that road because of a scarcity of rolling stock.

That said cars were not the means which the service required for its efficient and safe performance, and were not reasonably and adequately safe for the purposes for which they were used, because there were no bumpers to keep the cars apart, and when the cars came together the floors met, or nearly so, so as to make it impossible to couple them in the usual and ordinary way, and difficult and dangerous to couple them at all, and that such cars were all the more unsafe and dangerous to be handled at night, because the petitioner, when employed in his usual and ordinary duties, in the usual and ordinary way, was unable to distinguish such cars from the ordinary platform cars, and could not know, except by quitting his usual post and making a close

inspection, that he was required to perform an extrahazardous service, and for this reason he had never before been called on to handle them or attempted to handle them at night.

That such cars were not reasonably and adequately safe for the purposes for which they were used, and it was negligence on the part of the receiver to use or permit them to be used in freight trains because of a scarcity of cars of a proper construction for such use.

That the court denied the petition and refused a rehearing on the ground that it was contributory negligence on the part of the petitioner to remain in the service of the road with the knowledge that such cars were passing over and being used on the road, even if said cars were absolutely unsafe and dangerous.

The bill of review has been filed and the appeal prosecuted to have the decree reviewed and reversed for this error of law.

ARGUMENT.

The demurrer to the bill of review presents two questions for decision:

1. Does a bill of review lie to a decree dismissing an intervening petition against the receiver in a railroad foreclosure suit?

2. Is it contributory negligence on the part of the employé to remain in the service of the railroad with the knowledge that cars are passing over and being used on the road which are unsafe and dangerous?

The first question does not appear to have been decided by this Court. The appellant filed his intervening petition in the foreclosure suit and came into a court of

equity to have his rights there determined according to the rules and practice of such courts.

Furrer *vs.* Ferris, 145 U. S., 132.

The bill of review is as much a remedy in chancery as a petition for rehearing or an appeal, and if the intervening petitioner is allowed one remedy it is difficult to understand how he can be denied the other.

If he is allowed the remedy the case comes within the rule, as the bill is filed to review the error of law in the decree.

The second question has been decided by this Court, and it will forever stand as a reproach to the jurisprudence that such a doctrine as that attributed to Judge Cooley should ever have prevailed.

It is, in effect, to say that if the receiver introduces on the railroad cars which are absolutely unsafe and dangerous it is contributory negligence on the part of the employé to remain in the employment upon which he depends for his daily bread, and that he is required to expose himself and his family to want and privation by quitting his employment because the receiver permitted such cars to be used on the road. The correct doctrine, which the learned judge should have applied, is the doctrine stated by this Court in Chicago, M. & St. P. R'y Co. *vs.* Ross, 112 U. S., 377, that the employer must furnish to the servant the means and appliances which the service requires for its efficient and safe performance, and, if he fail in that respect and an injury results, he is liable to the servant as he would be to a stranger.

The appellant, having submitted himself to the jurisdiction of the court, had a right to all the remedies and to all the relief which the court could give him, and if the learned judge dismissed his petition and denied him a rehearing for the reason stated in the bill and admitted by the demurrer

it was error of law for which the decree should be reviewed and reversed.

If the court had applied the correct doctrine, it would have rendered a decree for the petitioner, and as it failed, because of such error of law, to render such decree, and the petitioner had no other remedy, it is respectfully submitted that the decree should be reversed.

WADE R. YOUNG,
Counsel for Appellant.